Supreme Court, U.S.
FILED

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In the
Supreme Court of the United States
October Term, 1997

STEVEN JOHN HARTMAN, D.C.,
and
ROBERT CHARLES HOFFMANN, D.C.,

Petitioners,

vs.

NORTHERN SERVICE, INC., N/K/A
HEALTH SERVICES MANAGEMENT, INC.,
A MINNESOTA CORPORATION,
and ROMAN WIELAND, INDIVIDUALLY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE MINNESOTA SUPREME COURT
AND MINNESOTA COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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QUESTIONS PRESENTED

I: Whether summary judgment on restraint of trade claims is appropriate where Plaintiffs-Providers offered uncontested evidence of restraint of trade including naked restraint on output and control of a large share of the local chiropractic market by a direct competitor, here, a physical therapist?

II: Whether Providers stated a prima facie case of tortious interference with contract or fraud or RICO, including extortion, mail fraud and wire fraud sufficient to withstand summary judgment?

III: Whether Plaintiffs-Chiropractors could be terminated as at-will employees where the contracts for services incorporated a specific procedure for termination which was not followed and annual, renewable terms?

IV: Whether defendants breached their contracts with Plaintiffs-Providers and are now liable to Providers for damages?

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

Dr. Steven Hartmann, D.C., and Dr. Robert Hoffmann, D.C., respectfully petition for a Writ of Certiorari to the Supreme Court of the State of Minnesota and the Minnesota Court of Appeals.

OPINIONS BELOW

Petitioners seek review of an unpublished decision of the Minnesota Court of Appeals, filed August 6, 1996; the Petition for rehearing was denied by an Order of the Minnesota Supreme Court filed October 15, 1996.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

Article VI [2] of the Constitution of the United States provides that the "Laws of the United States...shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby...." Also, "[n]o State shall...pass any...Law impairing the Obligation of Contracts...," Article I, Section 10 [1].

STATEMENT OF THE CASE

Dr. Steven Hartmann, D.C., and Dr. Robert Hoffmann, D.C., (Providers) contracted individually with Roman Wieland

and Northern Services, Inc. (NSI), now known as Health Services Management, Inc., to provide chiropractic care to PreferredOne subscribers. Each personal contract directly incorporates by reference the contract between NSI and PreferredOne, and binds the Providers to the conditions of the NSI-PreferredOne contract. More pointedly, the NSI-Provider contract adopted completely the NSI-PreferredOne termination procedure.

Roman Wieland is not a chiropractor, but he is a licensed physical therapist, a health care speciality which directly competes for the same patient market at chiropractors. Wieland intended to control the chiropractic market to protect his own market as a physical therapist, a market where he shares in a large physical therapy practice, Gallery Physical Therapy.

The NSI contract allowed each Provider to treat a patient up to 10 times, with NSI's chiropractic director authorizing additional treatment, as necessary.

The PreferredOne contract with NSI is referenced and its terms were incorporated into the NSI contract:

> NSI has a contract with Preferred to coordinate the provision of chiropractic services to Members. A copy of that contract is attached hereto as Exhibit "A" and incorporated into this Agreement. Provider hereby agrees to comply with all the terms and conditions of that contract to the extent that they directly or indirectly bear upon the subject matter of this Agreement.

Rather than renegotiating the contracts to establish lower patient-visit averages, Wieland demanded that each Provider reduce his patient-visit average to 30% less than the ten visits allowed in the contract; and Wieland threatened to terminate the contracts if this reduction were not achieved. By means of these demands, Wieland manipulated the chiropractic market to increase his own corporation's market appeal and to shift care to

physical therapists. HMO's and PPO's would obviously prefer to pay less per patient for care.

In a revealing colloquy with Dr. Hoffmann, Wieland admits that "I don't give a damn about patient satisfaction;" and, "I don't care what the contract says. You need to get your visits below 7.0."

Although each Provider reduced patient care and although Dr. Hoffmann did not bill certain PreferredOne patients, Wieland terminated each Provider's contract although the patient-visit averages were lower than those contracted for and although each patient's care had been prior-authorized by NSI's chiropractic director. Also, Wieland's termination of the contracts did not follow the contract's termination procedure which contained substantive due process rights. Wieland considered the Providers to be at-will employees who could be terminated with or without cause notwithstanding the termination procedure.

Each Provider has lost access to a large part of the Minneapolis-St. Paul market share for chiropractic services and has forfeited in excess of $40,000 in annual compensation.

Wieland's patient-visit-numbers do not correlate with those of Blue Cross or the statistics gathered by the American Chiropractic Association. These numbers have nothing to do with normal market forces or with the standard of care adopted by chiropractors in Minnesota.

The Providers brought suit against Wieland and NSI, alleging fraud, breach of contract, tortious interference with contract, restraint of trade, antitrust, defamation and RICO violations, including extortion, mail fraud, and wire fraud.

COURSE OF PROCEEDINGS

The trial court granted defendants' motion for summary judgment on all claims except the breach of contract claims. On a motion for reconsideration, the trial court dismissed the contract claims too. The Minnesota Court of Appeals affirmed the trial court's decision. The Minnesota Supreme Court declined review.

REASONS FOR GRANTING THE WRIT

The apparent assumption underlying the decision of the Minnesota Court of Appeals is that managed health care needs the freedom to act to provide adequate care at the lowest possible cost to its participants and that certain contractual, statutory, and Constitutional safeguards may have to be set aside.

Roman Wieland and NSI have restrained trade by reducing the output of each Provider. Rather than having the market or professional treatment protocols determine an average number of patient-visits for treatment, Wieland and his colleagues set treatment averages by fiat and enforced these averages by threats of termination. Arizona v. Maricopa County Medical Society, 457 U.S. 332 (1982), teaches that the per se rule involving restraint of trade applies with equal effect to health care. See also "Price Effect' Not Essential to Sherman Act Violation: Even the Single 'Small Merchant' Has Antitrust Rights," 24 Antitrust Law & Economic Review 37-46 (1993), reviewing particularly, Klor's, Inc., v. Broadway-Hale Stores, 359 U.S. 207 (1959). The recent article in The Antitrust Bulletin/Fall 1996, "Congress and antitrust exemptions: is statutory antitrust relief necessary for health care reform?", reflects concern on the part of health care providers and insurers related to restraint of trade issues.

State by Humphrey v. Road Constructors, Inc., 474 N.W.2d 324 (Minn. Ct. App. 1991), acknowledges that "Minnesota antitrust law is interpreted consistently with **federal**

case law developed under the Sherman Act," (emphasis added) namely Minnesota Statutes, Section 325D.49 to .66. There are simple requirements: "[A]llegations adequate to show a[n antitrust] violation and, in a private treble damage action, that plaintiff was damaged are all that the law requires," Radiant Burners, Inc. v. Peoples Gas Co., 364 U.S. 656, 659-660 (1961). See also Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 236 (1948); and, Blue Shield of Virginia v. McCready, 457 U.S. 465, 472 (1981).

The Providers in this action have consistently argued that Wieland and NSI forced a reduction in output which is on its face a naked restraint on trade:

> The NBA's 5-game reduction falls in the same category as the restraints in [FTC v.] Indiana [Federation of Dentists, 476 U.S. 447 (1986)] and [National Collegiate Athletic Ass'n v. Board of Regents of the University of Oklahoma, 435 U.S. 679 (1984)]. Its adverse anticompetitive effects have been established, and the justifications that have been offered in its defense are inadequate, at least on the present record. There is no evidence that it serves any legitimate objective. It stands, therefore, as a naked restraint subject to condemnation even without proof of market power. See P. Areeda, **Rule of Reason--A Catechism on Competition**, 55 Antitrust Law Journal, 571, 577-78 (1986).

Chicago Pro Sports et al. v. National Basketball Ass'n, 754 F. Supp. 1336, 1363 (N.D. Ill. 1991). Accord, National Society of Professional Engineers v. United States, 435 U.S. 679 (1978).

Wieland had no right under contract to reduce the patient-visit average to a number below the a base level of ten visits.

Q: ...Does the contract that you [Roman Wieland] signed between yourself and Dr. Hartmann and Dr. Hoffmann indicate that up to ten visits would be permitted?

A: Yes.

Q: Was there anything in the contract that said that patient averages below ten would be required?

A: I don't recall. No.

The Minnesota Court of Appeals held that "regulating the number of visits allowed per patient would be a factor considered by those selecting a provider, [and so] regulating the number of visits arguably promotes competition." Court of Appeals Decision at 6. There is no principled basis for this conclusion. In fact, this conclusion stands at odds with the federal case law considering restraints on output.

A provider who is subject to unwritten demands and to the personal duress of a corporate insider has no apparent protection under contract. Without knowledge of allowed, reimbursable care, a Provider cannot intelligently contract.

An HMO or a PPO has two means to limit reimbursed services: First, the HMO may simply contract for the precise reimbursement to be paid for a particular service or number of services. Secondly, an HMO may require an in-house healthcare professional to pre-approve the medical (here, chiropractic) necessity of the number of services for which the caregiver will be paid. The NSI Provider contract contains both these safeguards. Roman Wieland disregarded the contractual ten patient-visit average and ignored the protests of Dr. Hartmann and Dr. Hoffmann that the care given to their respective patients had been approved by NSI's own licensed chiropractic director.

These facts demonstrate that defendants Wieland and NSI restrained trade and breached the NSI-Provider contracts. This case comes to this Supreme Court from a summary judgment; the review is de novo, and all facts asserted by the Providers must be taken as true.

The Court of Appeals decided that the NSI-Provider contract was terminable at will despite provisions for a termination procedure and annually-renewable contract years. In Minnesota, a contract is ambiguous if it is reasonably subject to more than one interpretation. Brault v. Acceptance Indemnity Ins. Co., 538 N.W.2d 144 (Minn. App. 1995); and any such ambiguities must be construed against the drafting party, Wick v. Murphy, 237 Minn. 447, 453, 54 N.W2d 805, 809 (1952).

The NSI contract specifically incorporates the PreferredOne contract with the intention of binding the parties to its terms. The NSI contract specifically incorporates the arbitration provisions of the PreferredOne contract which import cause for termination into the NSI contract:

> Q: Was this NSI contract supposed to be appended as Exhibit A to the Specialist Provider Agreement.
>
> A: I believe in most cases it was....
>
> Q: So if Drs. Hartmann and Hoffmann didn't get a copy of the PreferredOne/NSI contract, it was probably an oversight?
>
> A: I would have to say it is, but I'm not sure they didn't get a contract because I think -- I'm almost sure all of the network providers got the PreferredOne contract as well as the Provider Agreement.

Another classic restraint of trade analysis applies here, Virginia Academy of Clinical Psychologists v. Blue Shield of Virginia, 624 F.2d 476 (4th Cir. 1980), a case where the Court concluded that billing for psychologists' treatment through a competing health care professional, here a psychiatrist, unlawfully diminished competition in the health field under the Sherman Act. Wieland and NSI channel billings for chiropractic care through a company run by a competing physical therapist.

United States v. A. Lanoy Alston, D.M.D., P.C., 974 F.2d 1206, 1210 (9th Cir. 1992), holds that price-fixing in violation of the Sherman Anti-Trust Act, is per se illegal and that it does

> not matter why the fees were fixed or whether they were too high or low; reasonable or unreasonable; fair or unfair. It is not a defense to price fixing that the defendants may have had good motives, or may have thought that what were doing was legal, or that the conspiracy may have had some good results.

One professional guild does not have the legal right to restrain the trade of another. As Dr. Steven Jackson, the former chiropractic director for NSI relates:

> A: [Wieland and I] had discussions and he informed me that he felt that chiropractors and physical therapists competed for the same patient population, that being individuals that suffer with musculoskeletal conditions, and he felt that it was a natural alliance, if you will, between physical therapy and chiropractic as being a similar avenue of referrals and treatment.
>
> So I would have to change my answer when I said I don't know. I would have to say that that's what he told me, that he felt there was

a similar patient population, that it would be easily managed since he [] managed in a physical therapy organization.

Q: Although, again, he's not a chiropractor.

A: Yeah; that's right.

* * *

Q: Do you think that [Roman Wieland] advocates chiropractic [medicine]?

* * *

A: No, I don't.

Jackson Deposition at 49 through 50.

Wieland and NSI tortiously interfered in the separate contracts between each Provider and that Provider's patients. The Providers actually rendered the care and should have been reimbursed under the NSI contract as well as the separate patient contracts. The statement by the Court of Appeals, at 7, that the patients "did not intend to be legally bound in a contractual relationship with the chiropractors" is inane and not based on any information in the record. Both Hartmann and Hoffmann provided in their Affidavits exemplars of signed contracts with patients which indicated that these chiropractors expected to be paid for their services.

The Supreme Court of Maine is less reluctant than the Minnesota Courts to allow that where "a person by fraud or intimidation procures the breach of a contract that would have continued but for such wrongful interference, that person can he liable in damages for such tortious interference." Pombriant v. Blue Cross/Blue Shield of Maine, 562 A.2d 656, 659 (Me. 1989).

Hartmann and Hoffmann also pleaded fraud. But without any responsive material, the Court of Appeals held that Wieland's statements at the signing of the contracts was not false at the time it was made. This is a jury issue, not proper for a judge to try as a matter of fact. The Providers have shown that Wieland repudiated the terms of his own NSI contract. The timing of Wieland's decision to abjure his contractual obligations is a crucial fact issue.

Wieland and NSI committed the requisite acts to state a claim under RICO.

The United States Supreme Court has indicated that Congress intended the RICO statute to be interpreted broadly, Sedima, S.P.R.L. v. Imrex, Co., 473 U.S. 479, 497-98 (1985).

18 U.S.C. Section 1951(b)(2), defines extortion as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." Dr. Hoffmann and Dr. Hartmann have repeatedly stated their complete comprehension of the threats made by Roman Wieland to terminate their provider contracts if each provider did not acquiesce in Wieland's squeezing down of patient average numbers.

"Fear of economic loss is sufficient to constitute extortion ... even if the interest threatened is only an anticipated one." United States v Rabbitt, 583 F.2d 1014, 1027 (8th Cir.1978), cert. denied, 439 U.S. 1116 (1979). Wieland knows how to use fear to control his market. Roman Wieland states, "I'm saying I don't have anything to with the pre-authorizations or if it's good chiropractics or bad chiropractics. I look at outcomes and I look at costs." Wieland Deposition at 70. And if costs are not coming down quickly enough, then threatening Providers with the loss of their contracts may work.

RICO requires certain characteristics: A common or shared purpose, a continuity of structure and personnel, and an

ascertainable structure distinct from the legitimate business to establish a pattern of racketeering activity. The common purpose in this case is NSI and PreferredOne and Gallery Physical Therapy acting together to reduce an individual patient's access to chiropractic services even where such access is guaranteed by contract.

The termination of Dr. Hartmann and Dr. Hoffmann as providers followed a predictable sequence: Threats and then termination when one appealed to one's rights under contract and under law, rather than knuckling under to the obvious extortion.

In addition to their extortion claims, Drs. Hartmann and Hoffmann have consistently asserted their having been deprived of the right to compete for market share: As the Court noted in Pearlstine Distributors, Inc. v. Freixenet USA, Inc., 678 F. Supp. 133, 136 (1988), loss of the right to compete may well state "predicate acts of mail and wire fraud." This "intangible right...is [a]dmittedly...not easily quantifiable, but it is a right established and protected by the federal antitrust laws, 15 U.S.C. [Sections] 1-27 and 44 (1973 and Supp. 1987)."

As the Eighth Circuit observed, mail fraud and wire fraud do not require a misstatement of fact, rather each is broad in scope" and is "measured by a nontechnical standard, condemning conduct which fails to conform to standards of moral righteousness, fundamental honesty, and fair play," Atlas Pile Driving Co. v. DiCon Finishing Co., 886 F.2d 986, 991 (8th Cir. 1989). This case buttresses its extortion bases for RICO liability with mail fraud and wire fraud claims.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Dated at St. Paul, Minnesota, this 13th day of January, 1997.

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APPENDIX-A

STATE OF MINNESOTA

IN SUPREME COURT

C1-96-135

Steven John Hartmann, D.C.,

Appellant,

vs.

Northern Services, Inc.,

Respondent.

ORDER

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that the petition of Steven John Hartmann for further review be, and the same is, denied.

Dated: October 15, 1996

BY THE COURT

APPENDIX-B

This opinion will be unpublished and may not be cited except as provided by Minn. Stat. § 480A.08, subd. 3 (1994).

STATE OF MINNESOTA

COURT OF APPEALS

CI-96-135

Steven John Hartmann, D.C., et al.,
Appellants,

vs.

Northern Services, Inc.,
n/k/a Health Services Management, Inc., et al.,
Respondents.

Filed August 6, 1996

Affirmed
Toussaint, **Chief Judge**

Washington County District Court
File No. C2-95-2042

Lawrence H. Crosby, Maury D. Beaulier, Crosby & Associates, 25 Empire Dr., St. Paul, MN 55103 (for appellants)

Thomas Fraser, Todd Wind, Fredrikson & Byron, P.A., 1100 International Centre, 900 Second Ave. S., Minneapolis, MN 55402 (for respondents)

Considered and decided by Huspeni, Presiding Judge, Toussaint, Chief Judge, and Foley, Judge.'

Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

TOUSSAINT, Chief Judge

Appellants, two chiropractors, brought this action challenging the termination of their contractual status as providers with respondent, a chiropractic services provider network. Respondent was granted summary judgment. Because we see no genuine issue of material fact precluding summary judgment and no error of law in the district court's rulings that appellants were at-will employees, that they failed to make claims for restraint of trade, tortious interference with contract, fraud and misrepresentation, RICO violations, and breach of contract, and that respondents were entitled to certain costs and fees, we affirm.

DECISION

Respondent Northern Services, Inc. (NSI), a chiropractic provider network, has a contract to provide chiropractic services for the PreferredOne plan. Respondent Roman Wieland, CEO and principal shareholder of NSI, engaged appellants Steven Hartmann and Robert Hofftnan, chiropractors, to provide these services.

The agreement appellants signed with NSI stated that either party could terminate the agreement at any time without cause; it also permitted appellants to work simultaneously for other networks and to practice independently. The agreement incorporated the contract between NSI and PreferredOne:

NSI is now known as Health Services Management, Inc.

A copy of that contract is attached hereto as Exhibit A and incorporated into this Agreement. Provider hereby agrees to

comply with all the terms and conditions of that contract to the extent that they directly or indirectly bear upon the subject matter of this Agreement.

The contract between NSI and PreferredOne includes a "Grounds for Termination" paragraph, specifying why PreferredOne may terminate providers; it also states that Providers who contest a PreferredOne decision to terminate them should follow the procedures given in the Minnesota arbitration statute.

Wieland terminated appellants' agreements with NSI. Appellants attributed the termination to Wieland's dissatisfaction with their patient-visit averages, i.e. the fact that they saw patients for more visits than NSI allowed. Wieland maintains that appellants were at-will employees who could be terminated without cause.

Appellants brought this action contesting their at-will status and claiming restraint of trade and antitrust violations, tortious interference, fraud and misrepresentation, breach of contract, and RICO violations. Respondents were granted summary judgment and. awarded certain fees and costs. Appellants challenge both the judgment and the award.

1. Summary Judgment

In reviewing summary judgments, this court asks whether there are any genuine issues of material fact and whether there was an error in the application of the law. ***State by Cooper*** v. ***French,*** 460 N.W.2d 2, 4 (Minn. 1990).

A. Appellants' Status as At-Will Employees

Despite language in their provider agreement that either party could terminate the agreement at will for no cause, appellants claim they were not at-will employees because two other paragraphs defeat their at-will status. One paragraph says that

appellants' agreement is in effect for one year and is renewable for successive one-year periods unless terminated; the other is the Grounds for Termination paragraph in the PreferredOne-NSI contract.

Appellants argue that the terminable-at-will provision and the successively renewable provision cannot be reconciled, that the agreement is therefore ambiguous, and that this ambiguity must be construed against the drafters, i.e. respondents. However, the "unless terminated" phrase in the successively-renewable paragraph shows that the drafters were aware of a possible conflict and resolved it in favor of the terminable-at-will paragraph.

Appellants cite *Pine River State Bank v. Mettille,* 333 N.W.2d 622, 626-27 (Minn. 1983), holding that an at-will employment agreement may be rendered contractual by the provisions of an employee handbook, to argue that the terminable-at-will status conferred by the agreement was changed to a contractual status by the Grounds For Termination paragraph in the PreferredOne-NSI contract. *Pine River*, however, is readily distinguishable. There, disciplinary procedures set forth in a handbook given by the employer to the employee were held to change an employee's terminable-at-will status to a contractual status. **Id.** at 63 1. Here, appellants invoke a paragraph in a contract to which they are not a party; that paragraph specifies the grounds for which PreferredOne, not NSI, will terminate providers. There is no contractual support for appellants' view that the explicit terminable-at-will provision of the agreement they signed with NSI is superseded by the Grounds for Termination paragraph of the contract between NSI and PreferredOne. We see no error of law in the district court's holding that the terminable at-will provision is enforceable.

B. Restraint of Trade and Anti-Trust Claims'

Although their agreements with respondents left appellants free to engage in private practice or to work for other network

providers, appellants argue that by limiting the number of visits per patient, respondents imposed an anticompetitive restriction on their output and denied their patients the treatment they sought. Appellants cite *Federal Trade Comm'n v. Indiana Fed'n of Dentists*, 476 U.S. 447, 106 S. Ct. 2009 (1986) to support their argument. However, the patients in *Indiana Fed'n of Dentists* were not demanding dental services; they (and their insurers) were demanding that dentists provide the insurers with the customers' x-rays. Id. at 458, 106 S. Ct. at 2017.

Indiana Fed'n of Dentists sets out two tests for unreasonable restraint of trade:

> the per se test and the "Rule of Reason" test. *Id.* at 457-58, 106 S. Ct. at 2017.
>
> [T]he per se approach has generally been limited to cases in which firms with market power boycott suppliers or customers in order to discourage them from doing business with a competitor--a situation obviously not present here. Moreover, we have been slow to condemn rules adopted by professional associations as unreasonable per se * * *.

Id. at 458, 106 S. Ct. at 2018. Here also, there is no indication respondents attempted anything resembling a group boycott of appellants, and appellants are explicitly permitted to supply their services to competitors or to engage in private practice. [Under] the Rule of Reason [test], the test of legality is:

> whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.

Id., 106 S. Ct. at 2017 (quoting *Chicago Board of Trade v. United States*, 246 U.S. 231, 238, 38 S. Ct. 242, 244 (1918)). Appellants present no evidence that regulating the number of visits per patient suppresses or destroys competition: in fact, since the number of visits allowed per patient would be a factor

considered by those selecting a provider, regulating the number of visits arguably promotes competition.

Appellants also argue that trade was restrained because customers under the PreferredOne plan were "restrained" from obtaining appellants' services after appellants were terminated by NSI. We find this argument unpersuasive, since every managed care medical plan provides financial incentives to use certain providers, thereby "restraining" customers from using other providers.

We conclude that appellants failed to make either an antitrust claim or a restraint of trade claim.

C. Tortious Interference Claim

Appellants claim that respondents tortiously interfered with the alleged contracts between appellants and their patients. However, a contract is a prerequisite to a tortious interference claim, and appellants cannot show that there was a contractual relationship between themselves and their patients.

In Glass Serv. Co., v. State Farm Mut. Auto. Ins. Co., 530 N.W.2d 867 (Minn. App. 1995), *review denied* (Minn. June 29, 1995). a glass repair company not on the list of State Farm glass repair referrals alleged that State Farm tortiously interfered with its contracts with customers and prospective customers.

> [T]here is no evidence that either Glass Serv. or its customers, at the time of scheduling appointments, intended to be legally bound. * * * [We] conclude that making an appointment [to have glass repaired] did not constitute a contract because neither party manifested an intent to be legally bound.

Id. at 870-71.

Appellants attempt to distinguish *Glass Serv.* by arguing that their customers did not merely make appointments for treatment

but signed contracts. This "contract," however, was actually an "Application for Treatment" on which patients described the type of relief desired and their symptoms, furnished other medical information, assigned payment of medical benefits, and agreed to a release of information and records. The Application for Treatment does not indicate that the customers intend to be legally bound in a contractual relationship with the chiropractors, and appellants presented no evidence of customers who did consider themselves so bound. Absent a contract, there can be no tortious interference.

D. Fraud and Misrepresentation Claims

A misrepresentation may be made either (1) by an affirmative statement that is itself false or (2) by concealing or not disclosing certain facts that render the facts that are disclosed misleading.

M.H. v. Caritas Family Servs., 488 N.W.2d 282, 289 (Minn. 1992). As examples of alleged misrepresentation, appellants claim respondents told them that they would be reimbursed for services rendered to patients, and that they would be able to practice their profession without undue interference. However, appellants do not show that either of these statements was false at the time it was made, or that respondents intended to disavow the terms of the agreement at the time it was made.

A misrepresentation claim also requires a showing that the party seeking to recover suffered damages as a result of reliance on the misrepresentation. Appellants suffered no damages other than the termination of their agreement with NSI, which was terminable at will. We conclude that appellants showed neither the false statement nor the damages required for a misrepresentation claim.

E. Breach of Contract Claim

Appellants' failure to show damages similarly defeats their other breach of contract claim. Appellants assert that they were

entitled to arbitration under the contract, but allege only the damages resulting from their termination and do not explain the nexus between these damages and the failure to arbitrate. This failure to show damages is fatal to their breach of contract claim.

F. RICO Claim

RICO imposes civil liability on those who engage in a pattern of racketeering activity; this requires two predicate acts within ten years. ***H.J., Inc.*** **v.** ***Northwestern Bell Tel.*** **Co.**, 492 U.S. 229, 229, 109 S. Ct. 2893, 2895 (1989). These acts must be related and must amount to or pose a threat of continued criminal activity. **Id.** at 239, 109 S. Ct. at 2901. Appellants accuse respondents of three predicate acts: extortion, fraud and mail fraud.

Extortion is defined as obtaining property from another, with consent, induced by a wrongful use of actual or threatened force, violence, or fear. 18 U.S. C. § 195 1 (b) (2). Appellants argue that respondents' threat to terminate their contract if they exceeded the required number of visits per patient was extortion because the threat caused them to fear economic loss. They offer no support for the view that threatening to terminate employment because of failure to comply with an employer's standard is extortion, nor do they say what property was allegedly obtained from them through the use of fear of economic loss.

Appellants base their allegation of fraud on the facts that Wieland claimed patients were being well-treated when, in appellants' opinion, they were not being well treated, and because NSI used one fee schedule with its providers and another fee schedule with PreferredOne. Appellants furnish no evidence of patients who were not well-treated, nor do they allege that anyone relied on this statement or was damaged by it. Respondents explain that NSI's income was derived from the difference between what PreferredOne paid for services and what NSI paid to the providers of those services. We see no fraud in either Wieland's statement or the two fee schedules.

Finally, appellants cite *Pearlstine Distrib., Inc. v. Freixenet USA, Inc.*, 678 F. Supp. 133, 136 (D.S.C. 1988) to argue that loss of the right to compete may imply predicate mail fraud acts under RICO. *Pearlstine* dismissed a RICO counterclaim.

> The counterclaim states that Pearlstine sent bills and other writings through the mails, but the connection between sending bills and concealing anti-competitive practices is not apparent to the court, and the term "other writings" certainly does not reflect the specificity sought by [Fed. R. Civ. P. 9(b)] -

Id. at 137. We are not persuaded by appellants' argument because it would entitle any provider of medical services not listed by a particular managed care plan to bring a RICO action against that plan for using the mail to publicize its lists of providers. Appellants' claim of mail fraud because NSI used the mail to communicate that appellants were no longer providers deprived them of their right to compete is equally unpersuasive. Appellants are still free to practice as chiropractors, and their former patients are still free to consult them: they have not been deprived of their right to compete. We conclude there was no RICO violation.

2. The Taxing of Costs and Disbursements

Appellants object to the district court's awarding respondents deposition transcript fees, service of process fees, and photocopying charges. Awarding of deposition costs to the prevailing party lies within the discretion of the district court. ***Romain* v. Pebble *Creek Partners***, 310 N.W.2d 118, 123-24 (Minn. 1981). In every district court action, the prevailing party shall be allowed costs. The district court has discretion in determining which is the prevailing party. *In re Gerschow's Will*, 261 N.W.2d 335, 340 (Minn. 1977).

Here, the court found that most of the depositions were noticed by appellants, that the depositions were necessary to the

parties and the court, and that respondents had been obligated to incur copying costs to provide copies for appellants pursuant to the Rules of Civil Procedure. We see no basis for holding that the district court abused its discretion in making this award..

No genuine issue of material fact precludes this summary judgment; no error of law was made in concluding that appellants failed either to make or to support their various claims and that respondents are entitled to their fees and costs.

Affirmed.

July 31, 1996. Edward Toussaint

APPENDIX-C

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF WASHINGTONTENTH JUDICIAL DISTRICT

Steven John Hartmann, D.C.,
and Robert Charles Hoffman,
D.C.,

Plaintiffs,

ORDER

vs.

Northern Services, Inc., n/k/a
Health Services Management,
Inc., a Minnesota corporation,
and Roman Wieland, individually,

Defendants.

The above-entitled matter came on for hearing before the undersigned on July 7, 1995, at the Washington County Government Center, Stillwater, Minnesota, on Defendants' motion for summary judgment and sanctions and Plaintiffs' motion seeking to amend their complaint. Lawrence Crosby, Esq., appeared on behalf of Plaintiffs. Todd Wind, Esq., appeared on behalf of Defendant.

Based on the files, records, and proceedings herein, the court makes the following:

ORDER

1. That Defendants' motion for summary judgment is

hereby **GRANTED** on Counts II, III, IV, and V of the Complaint. Accordingly, Counts II, III, IV, and V of the complaint are hereby **DISMISSED**.

2. that Defendants' motion for summary judgment is hereby **DENIED** on Count I of the Complaint.

3. That Defendants' motion for sanctions against Plaintiffs is **DENIED**.

4. That Plaintiffs' motion to amend the Complaint is **GRANTED** for Count I of the Complaint.

5. That the Washington County Court Administrator shall serve a true and correct copy of this Order by U.S. Mail upon counsel for the parties. Such service shall constitute sufficient and proper service of this Order for all purposes.

The attached memorandum is by reference incorporated herein.

Dated: [8/29/95]

[Signed by Kenneth J. Maas, Judge of District Court]

MEMORANDUM

Re: Steven John Hartmann, D.C. et at. v. Northern Services, Inc., et al.
Case No. C2-95-2042

The legal basis for a Motion for Summary Judgment is Minn. R. Civ. Pro. 56. Rule 56.03 provides the standard for summary judgment. The rule states in pertinent part:

> Judgement shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that

> there is no genuine issue of material fact, and that either party is entitled to judgment as a matter of law.

See also, Fabio v. Bellomo, 504 N.W.2d 758, 761 (Minn. 1993).

Summary judgement is not properly granted if genuine issues of material fact exist. In Poplinski v. Gislason, 397 N.W.2d 412 (Minn.Ct.App. 1986), the court stated:

> "If any doubt exists as to the existence of a genuine issue of material fact, the doubt must be resolved in favor of finding that a material facts exists."

Minnesota courts have also held that "summary judgment is a blunt instrument to be employed only where it is perfectly clear that no genuine issue of fact is involved." Donnay v. Voulware, 144 N.W.2d 711, 716 (Minn. 1996).

The burden is on the moving party seeking summary judgment to show the absence of any genuine issue of material fact. When the moving party has met the burden, the party opposing its motion must establish the existence of a genuine issue of material fact. Bixler v. J.C. Penney, 376 N.W.2d 209, 217 (Minn. 1983). The opposing party cannot rely on general statements in opposition to a motion for summary judgment. Specific facts must be identified which establish the existence of a "triable fact." Ahlen v. Rooney, 143 N.W.2d 65, 68 (Minn. 1966). The court must view the evidence in the light most favorable to the nonmoving party, and is not required to save the nonmoving party by drawing unreasonable inferences. City of Savage v. Varey, 358 N.W.2d 102, 105 (Minn.Ct.App. 1984). All doubts and factual inferences must be resolved against the moving party. Anderson v. Twin City Rapid Transit Co., 84 N.W.2d 593, 605 (Minn. 1957). Further, is "is not part of the court's function to decide issues of fact, but solely to determine whether there is an issue of fact, to be tried. Id. These Minnesota cases and holdings demonstrate that summary judgment is an extreme remedy. It should be granted only where

the moving party has established a right to summary judgment with such clarity as to leave no room for doubt, and only where the nonmoving party is not entitled to recover under any circumstances.

Plaintiffs have failed to meet the burden of establishing the existence of material facts which would support the elements of a claim for tortious interference with contract, Count II of the Complaint. Minnesota courts have set forth the elements of intentional interference with contract as: (1) the existence of a contract; (2) the alleged wrongdoer's knowledge of the contract; (3) his intentional procurement of its breach; (4) without justification; and (5) damages resulting therefrom. Bouten v. Richard Miller Homes, Inc., 321 N.W.2d 895, 900 citing Royal Realty Co. v. Levin, 69 N.W.2d 667 (Minn. 1955). Summary judgment is appropriate when a party fails to make a showing sufficient to establish the existence of an element essential to that party's case. Oacona v. Schrupp, 521 N.W.2d 70, 72 (Minn.Ct.App. 1994) citing Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Hugh Transit v. Nat. Farmers Organization, 472 N.W.2d 358, 360 (Minn.Ct.App. 1991); Davis v. Midwest Discount Sec. Inc., 439 N.W.2d 383, 386 (Minn.Ct.App. 1989).

In the instant case, summary judgment is appropriate; as Defendants' contend, Plaintiffs have failed to establish the existence of a enforceable contract between themselves and their patients. In Glass Service Company, Inc. v. State Farm Mut. Automobile Ins. Co., 530 N.W.2d 867 (Minn.Ct.App. 1995) the court found that people do not intend to be legally bound when they make appointments to have their hair cut or teeth checked. Glass Service Company, Inc. is clearly analogous to our facts. Chiropractic patients do not intend to be legally bound by the contracts they sign with these practitioners. Given Plaintiffs' inability on the facts here to show the existence of a contract, further analysis of the other elements of this claim is unnecessary.

Plaintiffs have also failed to establish the elements of a fraud or restraint of trade tort. Summary judgment is appropriate when a party fails to make a showing sufficient to establish the existence of an element essential to that party's case. Iacone v. Schrup, supra. The tort of fraud consist of eleven elements. Davis v. Re-Trac Manufacturing Corp., 149 N.W.2d 37, 38-39 (Minn. 1967); Florenzano v. Olson, 387 N.W.2d 168, 174 (Minn. 1986). Succinctly stated, fraud requires a false and material representation, false at the time it was made, that induces action on the part of the other person who suffers damages as a result of the misrepresentation. Hanks v. Hubbard Broadcasting, Inc., 495 N.W.2d 302 (Minn.Ct.App. 1992); M.H. v. Caitas Family Services, 488 N.W.2d 282 (Minn.Ct.App. 1991).

Plaintiffs have failed to establish a misrepresentation of a material fact and damages, necessary elements of this tort.

Plaintiffs present five fact patterns in their Amended Complaint upon which they base their fraud claim. In each pattern, no statement is alleged that was false at the time it was made nor which induced a reliance by Plaintiffs that resulted in any damages, other than the termination of their contract, which was terminable without cause. See, e.g., Caritas as 289. Therefore summary judgment is appropriate on this claim.

Under Count III, Plaintiffs seek to allege a second cause of action, restraint of trade. Restraint of trade as governed by Minn. Stat. Sec. 325D et seq. is inapplicable to the facts of this case. A review of this law reveals an emphasis on contracts and conspiracies between two or more persons that unreasonably restrain trade or commerce. See, e.g., State by Humphrey v. Road Constructors, Inc., 474 N.W.2d 224 (Minn.Ct.App. 1991). In its federal application, Congress created a remedy in the Clayton Act for persons suffering a business injury as a result of combinations operating in restraint of trade. Reiter v. Sonotone Corp. (8th Cir. 1979) 579 F.2d 1077; State by Humphrey, supra. In our case, Plaintiffs allege that NSI's adherence to an 8-10 patient visits restrained the Plaintiffs' from meeting their own

professional standards and standards set by national professional networks. A restraint of trade claim does not lie merely because Plaintiffs believed patients were receiving less care than Plaintiffs believed to be necessary or less care than set by national professional associations. Plaintiffs have presented no additional facts that would bring this case within the purview of a restraint of trade action. Thus, this claim must also fail.

In Count IV of their Complaint, Plaintiffs allege that Defendants defamed Plaintiffs. Specifically, Plaintiffs contend that Defendants made defamatory statements that charged the chiropractors with over-utilizing services and treating patients with too many treatments; these alleged statements resulted in harm to Plaintiffs' business reputation and loss of patients and business. To establish a cause of action in defamation, Plaintiffs must show that a false statement about them was communicated to another person, that is false, and that it tends to harm the Plaintiff's reputation and lower him in the estimation of the community. McGrath v. TCF Bank Sav., 502 N.W.2d 801 (Minn.Ct.App. 1993); Stuempges v. Parke, Davis & Co., 297 N.W.2d 252, 255 (Minn. 1980).

Plaintiffs base their defamation claim on Wieland. Statements that they were being terminated because they had "overutilized services." In his deposition, page 134, Dr. Hartmann agrees that he was the highest utilizer in the network, thus making the alleged defamatory statement true. Truth is a defense in Dr. Hartmann's circumstances, since he has stated under oath that the statement was true. Stuempeges at 255. Dr. Hoffmann states in his deposition, page 108-109, that the alleged defamatory statement that he overutilized services was made by Mr. Wieland only to him, Dr. Hoffmann, and that the effect of the statement affected his credibility with some of his patients. Further, he claims that he lost credibility with some of his patients, not that his professional reputation was damages. For Dr. Hoffmann, there is not publication of the statement to a third party, a necessary element of a defamation claim. See, Lewis v. Equitable Life Assur. Soc., 389 N.W.2d 876, 886 (Minn. 1986).

For these reasons, Plaintiffs' defamation claim must fail. Both Plaintiffs, by their own admissions, have shown that the alleged defamatory statements fail to establish a cause of action.

Plaintiffs also allege a RICO claim. The RICO statute, 18 U.S.C. Secs. 1964(c), provides for civil damages for "any person injured in his business or property by reason of a violation of the statute." The RICO statute requires a "pattern of racketeering activity" consisting of at least two racketeering acts within a ten year period. Tabas v. Tabas, 47 F.3d 1280, 1290 (3rd Cir. 1995) citing 18 U.S.C. Sec. 1961(5). Offenses enumerated in the statute as racketeering activity include murder, kidnaping, arson, bribery, extortion and other types of traditional gangster activity as well as mail and wire fraud. Tabas at 1290.

To prove a "pattern" of racketeering activity, the U.S. Supreme Court has set out an analysis consisting of two parts. A plaintiff must show "that the racketeering predicates are related and that they amount to or pose a threat of continued criminal activity." H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 239 (emphasis in original). To establish that predicate acts are "related," they will "have the same similar purposes, results, participants, victims, or methods of commission, or are otherwise interrelated by distinguishing characteristics and are not isolated events." Id. at 240. For "continuity," the Court found it could either refer to a closed period of repeated conduct or to past conduct that by its nature projects into the future with a threat of repetition.[1] Consequently, a party could prove continuity by

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[1] In civil RICO complaints based mail fraud, the continuity trest requires the court to look beyond the predicate acts of mail fraud and examine the underlying scheme or artifice. Tabas at 1294 citing Kehr Packages v. Fidelcon, Inc., 996 F.2d 1406, 1414 (3rd.Cir.1991). Although the mail fraud is the criminal act, the instances of deceit constituting the underlying fraudulent scheme are most relevant to the continuity analysis.

establishing "a series of related predicate acts extending over a substantial period of time." Id. at 242. (emphasis in original).

Federal law clearly precludes any RICO claim as a matter of law based on the facts presented by Plaintiffs. Plaintiffs describe two required predicate acts: first, an ultimatum to reduce patient-visit averages constituting extortion communicated to Plaintiffs using U.S. mail and the telephone; second, Mr. Wieland's concealing information, i.e. failing to provide copies of the contract, of which he had a duty to disclose. These two acts fail to fall within the type of racketeering activity contemplated by the RICO statute. The first act, an ultimatum which fails to extortion, also is insufficient to establish an underlying fraud scheme or a continue threat of criminal activity as required for mail fraud under RICO.[2] The second act also fails as a "predicate act" under 18 U.S.C. Sec. 1961.

Plaintiffs have established a claim for breach contract. Issues of material fact exist on whether the contract between NSI and Plaintiffs was breached. The language of the contract between the parties reads that providers "agree to arbitrate all disputes arising under this Agreement in accordance with the arbitration policies and procedures are set out in the attached NSI/Preferred [One] contract." Dr. Hartmann states in his affidavit dated June 29, 1995, that he sought a reason for his termination via certified letters dated December 9, 1991, and January 6, 1992, to Mr. Wieland so that he could commence the arbitration process; he received no reply. Counsel for Plaintiffs also requested an arbitration with Mr. Wieland which was not granted. These facts create a dispute regarding whether Defendants breached the provisions of the contract between the parties involving arbitration.

[initialed by K.J.M.]

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[2] See note 1, supra.

APPENDIX-D

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF WASHINGTONTENTH JUDICIAL DISTRICT

Steven John Hartmann, D.C.,
and Robert Charles Hoffman,
D.C.,

Plaintiffs,

vs.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Northern Services, Inc., n/k/a
Health Services Management,
Inc., a Minnesota corporation,
and Roman Wieland, individually,

Defendants.

The above-entitled matter came before the court on Defendant's written motion for clarification and/or reconsideration filed September 8, 1995, and Plaintiff's subsequent written motion and response to motion to reconsider filed September 18, 1995.

Based upon the files, records, and proceedings herein, the court makes the following:

FINDINGS OF FACT

1. That by previous order of this Court, dated August 29, 1995, Defendant was granted summary judgment on all counts of Plaintiffs' Complaint except Count I, Breach of Contract.

2. That this Court found in its previous Order that fact issues existed regarding Plaintiffs' contractual rights to arbitration; these fact issues prevented the Court from granting Defendant's motion for summary judgment on Count I of the Complaint.

3. That Plaintiffs' contract with Defendant Northern Services Inc. provided that either party may terminate the agreement without cause upon proper notice.

4. That on April 6, 1993, Roman Wieland acting in his capacity as CEO of Health Services Management (HSM) (formerly Northern Services Inc.) sent a letter by certified mail, return receipt requested, to Dr. Hoffmann notifying the chiropractor that his contract with HSM would be terminated 90 days from the date of the notice as provided in the Provider Agreement.

5. That Roman Wieland, on December 5, 1991, acting in his capacity as CEO of Northern Services Inc. sent a letter by certified mail, return receipt requested, to Dr. Hartmann stating that the chiropractor's contracts with HSM and RTW would be terminated in 90 days as provided in his Provider Agreement.

6. That Dr. Hartmann states in his affidavit dated June 29, 1995, that he sought a reason for his termination via certified letters dated December 9, 1991, and January 6, 1992, to Roman Wieland so that he could commence the arbitration with Mr. Wieland which was not granted.

6. That Dr. Hartmann states in his deposition that his reason for naming Roman Wieland personally in the above-referenced law suit was because he was sole owner of the stock in Northern Services Inc.

7. That Dr. Hartmann further states in his deposition that the harm suffered from the alleged breach of contract was to patients who could longer afford to come for appointments

without the benefits (i.e. their health care providers paying some of the costs); the patients in his estimation were harmed economically. He also states that his reputation was harmed because he did not have a good explanation as to why he was terminated from the network.

8. That Dr. Hoffmann in his deposition states the damages he sustained from the alleged breach of contract was harm to his reputation.

CONCLUSION OF LAW

1. That any harm or damages that Plaintiffs have alleged they sustained resulted for the termination of their contracts with Northern Service Inc./HSM. The contract between the parties was terminable by either party without cause. Their contracts were terminated according to contract terms when Roman Wieland acting in his capacity as CEO of NSI/HSM notified them via certified letter of their termination from the network ninety days after receipt of the letter.

2. That there is no relationship between Plaintiffs' alleged damages from the termination of their contract and the facts creating a dispute regarding any failure to arbitrate.

3. That Plaintiffs' failure to establish the element of damages, a necessary element of a breach contract claim, results in this Court granting summary judgment on any remaining causes of action under Count I of the Complaint.

4. That Roman Wieland acted at all times in his business dealings with the parties in the capacity as officer of his company, Northern Services Inc./Health Services Management. Consequently, Plaintiffs have no cause of action against Roman Wieland individually.

ORDER

1. That Defendant's motion for summary judgment is hereby **GRANTED** on Count I of the Complaint in its entirety. Plaintiffs have no further causes of action under Count I of the Complaint.

2. That any causes of action initiated by Plaintiffs in their Complaint against the Defendant, Roman Wieland, individually, are hereby **DISMISSED**.

3. That the Washington County Court Administrator shall serve a true and correct copy of this Order by U.S. Mail upon counsel for the parties. Such service shall constitute sufficient and proper service of this Order for all purposes.

Dated: [10/23/95]

[Signed by Kenneth J. Maas, Judge of District Court]

MEMORANDUM

RE: **Steven John Hartmann, D.C. and Robert Charles Hoffman, D.C. v. Northern Services, Inc., n/k/a Health Services Management Inc., a Minnesota Corporation, and Roman Wieland, individually**
Court Case No. : C2-95-2042

Summary judgment is appropriate when a party fails to make a showing sufficient to establish the existence of an element essential to that party's case. Iacone v. Schrup, 521 N.W.2d 70, 72 (Minn. Ct. App. 1994) citing Celotex Corp v. Catrett, 477 U.S. 317, 322 (1986); Hugh Transit v. Nat. Farmers Organization, 472 N.W.2d 358, 360 (Minn. Ct. App. 1991); Davis v. Midwest Discount Sec. Inc., 439 N.W.2d 383, 386 (Minn. Ct. App. 1989).

In the instant case, summary judgment is appropriate; as Defendants contend, Plaintiffs have failed to establish the

element of damages in their breach of contract claim. No link exists between the damages Plaintiffs assert they have sustained and the fact issues presented by the alleged failure to arbitrate. Plaintiffs' alleged damages are the result of the termination of the contract according to its terms.

Plaintiffs have failed to articulate any basis for a cause of action between themselves and Roman Wieland individually.

[Initialed by K.J.M.]